APPENDIX A.

MEMORANDUM.

This law suit arises out of a contract between the parties. By this agreement Bellanca agreed to sell and Bankers agreed to purchase 1,112,500 shares of the common stock of the Automatic Washer Company ("Automatic") for a specified price of $8.00 a share or a total of $8,900,000; 500,000 shares were to be delivered upon the execution of the agreement and 612,500 shares were to be delivered ninety (90) days thereafter. Also ninety (90) days thereafter, Bellanca agreed to deliver to Bankers enough additional shares of Automatic so that Bankers would own 51% of the outstanding shares of Automatic.

Bankers agreed to pay the purchase price of $8,900,000 for the 1,112,500 shares by transferring to Bellanca: (a) shares of R & H Holding Corporation (which owned hotels) "valued for this purpose" at $2,450,000; (b) shares of the Col-Tex Oil, Incorporated "valued for the purpose herein" at $4,700,000; (c) stock of the Lincoln Oil Company "valued for the purpose herein" at $450,000; and (d) shares of the National Drilling Company "valued for the purpose herein" at $1,300,000.

Bankers also agreed to lend specified sums in return for mortgages on the hotel and oil properties of the corporations whose stock was transferred.

Bellanca delivered the first 500,000 shares as provided in the agreement but made no further deliveries. After the ninety (90) day period had gone by and no further delivery had been made Bankers retained these shares

but otherwise terminated the agreement. Bankers stated in a letter to Bellanca, "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock".

Bankers sued Bellanca to claim damages for the breach of contract. Bellanca has counterclaimed; Count V of its amended counterclaim is now before the court for consideration. Bellanca in this count asserts that it delivered 500,000 shares which were kept by Bankers and that it is entitled to receive payment for these 500,000 shares in cash at the contract rate of $8.00 per share, or $4,000,000. It now asks judgment on the pleadings for this amount on its Count V of the amended counterclaim.

Bellanca relies on Section 44 of the Illinois Sales Act (Chapter 121½ Ill. Rev. Stat. Ann. 44) which provides:

> "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received."

It is Bellanca's argument that this agreement was one for a sale of stock and that the Sales Act, therefore, applies. It contends that Bankers knew that no further deliveries of stock would be made after the original 500,000 was transferred and that Section 44 of the Sales Act requires that payment be made for the shares delivered at the contract rate. Further, it contends that Bankers' failure to pay for the stock which it had retained has confirmed the obligation to pay in stock to one to pay in cash at the rate of $8.00 a share.

The answer to this theory is that the Sales Act does not apply here for the reason that this is not a "contract of sale" and not covered by that Act (Chap. 121½ Ill. Rev. Stat. Ann. Sec. 1, et seq.). Section 1 defines "Contracts to Sell" as contracts "whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price." However, not every contract in which goods are sold is covered by this definition. Interpretation by the courts has made it plain that the Act covers sales in which the transfer of the property in a thing sold from a seller to a buyer for a price "*is the essence of the transaction*", *Chapin* v. *Tampoorlos*, 325 Ill. App. 219, 223 (1945). Thus in one case, although there was a sale of books, the court reasoned that the "express purpose of" the agreement was to create an agency, and the contract was held not to be a "sale", *Rudin* v. *King-Richardson Co.*, 37 F. (2d) 637, 645 (7th Cir., 1930). And in *Close* v. *Browne*, 230 Ill. 228, 240 (907), a contract for the transfer of land was found not to be a "sale" in the ordinary sense so as to involve a brokerage commission. The court pointed out that "while it is true that the owners of the Kansas lands parted with the title to the lands", they did it for the purpose of consolidating their various interests and not for the purpose of making a "sale". See also, *Fargo Glass & Paint Co.* v. *Globe American Corporation*, 161 F. (2d) 811 (7th Cir., 1947); *The Mercantile Trust Co. of Illinois* v. *Kastor*, 273 Ill. 332, 339 (1916); *Dorothy* v. *The Commonwealth Commercial Company*, 278 Ill. 629, 649 (1917).

Similarly, in the instant case it is apparent from the face of the contract that the "essence of the transaction" was not to sell any particular number of shares of the stock of Automatic. The completed transaction would have made Bankers the owner of 51% of the outstanding shares of Automatic and would have made Bellanca the owner of

shares in various other corporations. The end result would have been a financing by Bankers of certain property owned by the corporations acquired by Bellanca. As in *Close* v. *Browne*, *supra*, the primary motive and effect of the contract was evidently a complex adjustment of the relationship of the parties, not the sale of stock.

Alternatively, even if it be assumed, for the sake of argument, that the Sales Act does apply, Section 44 would not govern the situation. That section is headed "Delivery of wrong quantity" and plainly covers exactly the situation which it describes: delivery of a quantity different from that ordered. That is not the situation here—500,000 shares were to be delivered as the first step in the agreement and this was done—there was no discrepancy as to the amount delivered.

Again alternatively, Bellanca's argument cannot prevail even if it be assumed that Section 44 of the Sales Act governs. For Bellanca says that payment for the 500,000 shares delivered must be made at the "contract rate" and that Bankers' failure to pay has changed its obligation to deliver specified shares into one to pay in cash the $8.00 a share mentioned in the agreement. *The Pennsylvania Re-treading Tire Company* v. *Goldberg*, 305 Ill. 54 (1922), cited in support of this argument, carries its refutation. It is there made clear that the obligation to pay in cash rather than in kind after breach of contract arises when the agreement is primarily for a specific number of dollars, and the other consideration specified is merely a substitute for dollars. Here, on the contrary, it is plain that the transfer of stock in the oil and hotel companies from Bankers to Bellanca was the primary consideration, and that $8.00 a share was merely a convenient measuring stick. This is apparent from the arrangements for the subsequent financing of the properties belonging to these companies, discussed above. The contract as a whole makes it plain

that a cash payment was not contemplated by the parties. For this reason, the "contract rate" referred to in Section 44 cannot be interpreted to mean $8.00 a share in cash.

Bankers has also advanced an affirmative defense to the amended counterclaim based on the asserted invalidity of the entire contract under the Securities and Exchange Act. This defense is relevant to Bankers' motion for summary judgment on all counts of the amended counterclaim, which is not now considered. The present motion considered is that of Bellanca for judgment on the pleadings on Count V. That Count is limited to a demand for a money judgment for $4,000,000 for the 500,000 shares delivered. As the above discussion indicates, that motion must in any event be denied. It is accordingly unnecessary to consider the affirmative defense at this time.

The motion of Bellanca Corporation, counter-claimant, for judgment on the pleadings on Count V of the amended counterclaim will be denied.

PHILIP L. SULLIVAN,
Judge.

March 3rd, 1959.

APPENDIX B.

MEMORANDUM.

The facts with which this action is concerned are outlined in the Court's memorandum dated March 3, 1959, which denied a motion for judgment on the pleadings on Count V of Bellanca's amended Counterclaim. The present motion is by Bankers and John MacArthur (Counter-defendants) for summary judgment on Counts I, II, III, IV, V and VI of that Counterclaim.

Those Counts, briefly summarized, are as follows: Count I (against Bankers) recites that Bellanca is prepared to deliver the stock it promised, and asks that Bankers be required to perform its agreements under the contract. Count II, also against Bankers, asks damages for alleged breach of the contract. Count III adds as defendant John MacArthur (President of Bankers at the relevant time), alleges fraud in the inducement of the contract and asks damages in tort. John MacArthur is the sole defendant in Count IV, which asks damages for alleged fraud on his part. Count VI is against Bankers, and asks for the reasonable value of the stock retained by Bankers.

Bankers' motion for summary judgment is on the sole ground that the contract between the parties is void under Sections 16(a) and (c) and 29(a) and (b) of the Securities and Exchange Act of 1934 (Title 15 U. S. C. §78p(a) and (c) and 78cc(a) and (b)), and Bellanca accordingly has no rights under it. It is not necessary to consider the merits of this argument, since it contradicts the assertions of the complaint and Bankers is accordingly estopped from asserting it.

The contract is described in the Court's memorandum of March 3, 1959. The complaint (which attaches a copy of that contract), makes the following allegations:

> "4. Since entering into the aforedescribed contract, plaintiff has been at all times, and is presently, ready, willing, and able to perform all obligations undertaken by it under the aforesaid contract, but defendant has failed and refused to perform its obligations, in that defendant has not tendered or delivered to plaintiff such additional amount of the common stock of Automatic Washer Company, described in the aforesaid contract, as would constitute fifty-one percent (51%) of the issued and outstanding shares of said common stock.
>
> "5. On August 8, 1956 plaintiff notified defendant that by reason of defendant's breach of aforesaid contract, plaintiff had elected to declare the contract terminated and had elected to retain the shares of stock delivered to it as aforesaid, under paragraph 3(i) of the aforesaid contract. A true and correct copy of said notice is attached hereto as Exhibit B and by reference incorporated herein."

"Exhibit B" is a letter from Bankers to Bellanca and reads:

> "You are hereby notified that you are in default and have breached the contract between us dated May 8, 1956. Your default and failure to perform material provisions of said contract include • • •
>
> "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock."

These allegations necessarily affirm the validity of the contract; any rights Bankers claims to the stock are derived from it. Further, the assertion of a breach of contract assumes its validity. As plaintiff, Bankers has necessarily taken the position that the contract is a valid one. It cannot, in the same proceeding, take the position when it becomes counter-defendant that the same instrument

is void. Plaintiff counter-defendant is now estopped from asserting a claim inconsistent with its previous position (*Tenney Telephone Co. v. United States*, 82 F. 2d 788 (7th Cir., 1936); *Grant v. Springer*, 330 Ill. 280 (1928); *Ferns v. Chapman*, 211 Ill. 597 (1904)).

Counter-defendant, John MacArthur, did not join in the complaint, and is accordingly not estopped on the grounds just discussed. However, the two Counts in which he is defendant (III and IV), are based on alleged fraud in the inducement of the contract. These allegations have been denied by Mr. MacArthur. There are apparent disputes as to material facts and a summary judgment would be impossible.

The motion of Counter-defendants for summary judgment on Counts I, II, III, IV, V and VI of the Counterclaim filed by Bellanca Corporation is denied.

PHILIP L. SULLIVAN,
Judge.

September 16, 1959.

APPENDIX C.

OPINION.

In stating briefly the framework for my memorandum of opinion in this case I adopt paragraphs one, two and four of the preliminary statement by Judge Sullivan in his memorandum filed herein on March 3, 1959 when he denied the motion of Bellanca Corporation for judgment on the pleadings on Count V of the counterclaim. Judge Sullivan's statements accords with the evidence and reads as follows:

> "This law suit arises out of a contract between the parties. By this agreement Bellanca agreed to sell and Bankers agreed to purchase 1,112,500 shares of the common stock of the Automatic Washer Company ('Automatic') for a specified price of $8.00 a share or a total of $8,900,000; 500,000 shares were to be delivered upon the execution of the agreement and 612,500 shares were to be delivered ninety (90) days thereafter. Also ninety (90) days thereafter, Bellanca agreed to deliver to Bankers enough additional shares of Automatic so that Bankers would own 51% of the outstanding shares of Automatic.
>
> "Bankers agreed to pay the purchase price of $8,900,000 for the 1,112,500 shares by transferring to Bellanca: (a) shares of R & H Holding Corporation (which owned hotels) 'valued for this purpose' at $2,450,000; (b) shares of the Col-Tex Oil, Incorporated 'valued for the purpose herein' at $4,700,000; (c) stock of the Lincoln Oil Company 'valued for the purpose herein' at $450,000; and (d) shares of the National Drilling Company 'valued for the purpose herein' at $1,300,000."

* * * * *

> "Bellanca delivered the first 500,000 shares as provided in the agreement but made no further deliveries. After the ninety (90) day period had gone by and no further delivery had been made Bankers retained these shares but otherwise terminated the agreement. Bankers stated in a letter to Bellanca, 'We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock'."

In extensively amended pleadings Bankers Life and Casualty Company sued Bellanca for damages for breach of contract and Bellanca counterclaimed. In advance of trial on the merits the complaint, as amended, and Counts I through IV of the counterclaim were dismissed and the case came on for trial on Counts V and VI of Bellanca's counterclaim and Bankers' answers thereto.

In substance, Counts V and VI of Bellanca's counterclaim allege the sale and delivery to Bankers of 500,000 shares of stock of Automatic Washer Company. In Count V Bellanca seeks payment for the shares at the alleged contract price of $8.00 per share; in Count VI Bellanca seeks to recover the reasonable value of the shares of common stock of Automatic Washer Company which Bankers had caused to be transferred of record into its name and which Bankers on August 8, 1956 elected to retain, as evidenced by its letter in writing.

Bankers, answering Counts V and VI of the counterclaim, admit the factual allegations in both counts except that it specifically denies that it is liable to Bellanca on either count in any amount.

As an alternate and affirmative defense to each count of the counterclaim Bankers says that at the time the contract between the parties was entered into Bellanca was the beneficial owner of more than ten per cent of common stock of Automatic Washer Company and that the common stock of said company was at said time registered

on the Midwest Stock Exchange which was a national securities exchange; that by said contract Bellanca agreed to sell to Bankers 1,112,500 shares of the common stock of the Automatic Washer Company and the contract provided for its performance within ninety days; that the contract was void and unenforceable under the provisions of Section 16(c) of the Securities and Exchange Act of 1934 (15 U. S. C. A. 78p (a) and (c)) and that Section 29(b) of the Act (15 U. S. C. A. 78cc(b)) prohibits payment for the stock.

After consideration of the contract before the court in the light of the provisions of the sections of the Securities Exchange Act relied upon by Bankers I have come to the conclusion that the contract is not void because of the Act and that it does not violate the Act or offend its purpose. Under the contract a trade of common stock for common stock was agreed upon between the parties for investment purposes. The consummation of the contract neither required nor contemplated any dealing on the stock exchange and, in fact, none occurred. Furthermore, if the court be wrong in reaching this conclusion and if under the Securities and Exchange Act the contract was unenforceable for reasons urged by Bankers, I am of opinion that Bankers had no right to retain the 500,000 shares of common stock upon Bellanca's default except upon the condition that it recompense Bellanca for the reasonable value of the stock.

Since August 8, 1956 to the date of trial Bankers has paid no consideration for the stock.

Bellanca having defaulted under the contract, Bankers, by law and by all rules of fairness, had the right on August 8, 1956 when Bellanca's default occurred to return the stock and be released from further liability under the contract. Bankers, having wrongfully elected to retain the

stock, became liable to Bellance for its reasonable value on that day.

The proof offered to establish the reasonable value of the stock on August 8, 1956 was to the effect that the common stock of Automatic Washer Company sold that day on the Midwest Stock Exchange for a low of 2½ per share and closed at 2⅝ per share. It would appear that the market price thus disclosed is a fair and lawful measure of the reasonable value of the stock on August 8, 1956. In view of the history of the fall of the market for the stock between May 8, 1956 and August 8, 1956 the more realistic value on August 8 is measured by the low sale of 2½. I find, therefore, that when Bankers elected to retain the stock on August 8 it became obligated to pay Bellanca the sum of $2.50 per share for the 500,000 shares which Bellanca had delivered to Bankers on May 8, 1956 or a total sum of $1,250,000, with interest at five per cent per annum from August 8, 1956.

FRED L. WHAM,
United States District Judge.

Dated: June 22, 1960.

APPENDIX D.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1960—April Session, 1961

BANKERS LIFE AND CASUALTY COMPANY,
Plaintiff,
v.
BELLANCA CORPORATION,
Defendant.

No. 13190

No. 13190
BELLANCA CORPORATION,
Counter-Claimant-Appellee,
v.
BANKERS LIFE AND CASUALTY COMPANY,
Counter-Defendant-Appellant.

No. 13191
BELLANCA CORPORATION,
Counter-Claimant-Appellant,
v.
BANKERS LIFE AND CASUALTY COMPANY,
Counter-Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 6, 1961

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Bankers Life and Casualty Company[1] commenced a state court action against Bellanca Corporation[2] seeking declaratory judgment as to the ownership of 500,000 shares of common stock of Automatic Washer Company.[3] Bellanca answered and filed a counterclaim which, as amended, seeks recovery of $4,000,000.00 from Bankers for 500,000 shares of Automatic it delivered to Bankers. After amendments in the pleadings the case was removed to the District Court on grounds of diversity. Motions for summary judgment and judgment on the pleadings were denied; Bankers' complaint was dismissed on its motion; Bellanca dismissed Counts I to IV inclusive of its counterclaim; and the cause proceeded to trial without a jury on the amended counterclaim (Counts V and VI) and the amended answer thereto.

The District Court after entering findings of fact, conclusions of law, and filing a written opinion granted judgment for Bellanca on Count VI of the counterclaim in the amount of $1,250,000.00 plus interest from August 8, 1956 at 5% per annum. Both parties appealed.

Under date of May 8, 1956 Bankers and Bellanca entered into an agreement reciting Bankers' desire to purchase from Bellanca 1,112,500 shares of common stock of Automatic and Bellanca's agreement to deliver or cause Automatic to deliver an additional amount so that Bankers will own not less than 51% of the issued and outstanding shares of Automatic. In the agreement Bellanca represents it has good title to the 1,112,500 shares of Automatic and authority to sell them and to deliver or cause Auto-

1. Counter-defendant-appellant in appeal No. 13190 and counter-defendant-appellee in appeal No. 13191. Referred to herein as Bankers.

2. Counter-claimant-appellee in No. 13190 and counter-claimant-appellant in No. 13191 and known as Bellanca Aircraft Corporation at the time suit was filed. Referred to herein as Bellanca.

3. Referred to herein as Automatic.

matic to deliver additional shares so that Bankers shall own at least 51% of the issued and outstanding shares of Automatic. The agreement states that Bellanca "hereby sells" and Bankers "hereby purchases" 1,112,500 shares of the common stock of Automatic for a total purchase price of $8,900,000.00 or $8.00 per share and provides that delivery by Bellanca to Bankers shall be made as follows:

> "(i) 500,000 shares shall be delivered on execution of this agreement and
>
> (ii) 612,500 shares shall be delivered on or before such date as shall be ninety (90) days after the date of this agreement."

The contract provides that Bankers shall make payment of the purchase price by making transfers to Bellanca of stocks in four corporations which were owned by Bankers, the stocks being valued for that purpose at stated amounts. Bankers committed itself to make loans aggregating approximately $5,000,000.00 on the properties owned by the corporations whose stock was to constitute the purchase price. Any additional shares of Automatic needed to make up the 51% stock interest were to be delivered within the ninety day period at $6.75 per share.

Upon execution of the agreement Bellanca delivered the 500,000 shares of Automatic to Bankers. No further deliveries were made and upon expiration of the ninety-day period Bankers notified Bellanca by letter under date of August 8, 1956 that:

> "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock."

The defense by Bankers to Bellanca's counterclaim for recovery for the 500,000 shares it delivered and Bankers elected to retain is grounded on Bankers' assertion that the contract of sale and Bellanca's conduct with respect

thereto violated Section 16(c) of the Securities and Exchange Act, 15 U. S. C. A. § 78p(a) and (c),[4] and consequently by reason of the provisions of Section 29(b) of the Act, 15 U. S. C. A. § 78cc(b), it need not pay for the 500,000 shares.

Insofar as here pertinent § 78cc(b) provides:

> "(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be *void* (1) *as regards the rights of any person who, in violation* of any such provision, rule, or regulation, shall have *made or engaged in the performance* of any such contract, . . ." (emphasis supplied)

Bankers on its appeal (No. 13190) contends that the District Court erred in not sustaining its affirmative defense both on its motion for summary judgment and on the trial of the cause, and in any event erred in the allowance of interest. Bellanca on its appeal (No. 13191) contends that its recovery should be based on the purchase

4. Automatic stock was registered and traded on a national securities exchange, the Midwest Stock Exchange, and Bellanca owned more than 10% of Automatic's common stock. Bankers contends that Bellanca, an "insider", violated the first clause of § 78p(c) by selling stock neither it nor a principal for which it acted owned, and violated the second clause by failing to make delivery within twenty days. It was stipulated that on May 8, 1956, Bellanca was the beneficial owner of 900,000 shares and the District Court found that Bellanca's president owned 269,800 shares on May 8, 1956 and had authorized Bellanca to contract for the sale of the 1,112,500 shares. The District Court concluded that Bankers had failed to prove a violation of the Securities Act and in its opinion stated that in any event Bankers had no right to retain the 500,000 shares upon Bellanca's default except upon the condition that it recompense Bellanca for the reasonable value thereof.

price stated in the May 8, 1956 agreement ($8.00 per share) or on the market value of the stock on the date of the transfer of ownership to Bankers ($6.75 per share).

We do not deem it necessary for the purposes of this case to review the findings of fact or conclusions of law of the District Court in so far as they bear on the question of whether the agreement of May 8, 1956 or Bellanca's conduct with respect thereto constitutes a violation of either clause (1) or clause (2) of 15 U. S. C. A. § 78p(c). Under the provisions of § 78cc(b) the consequence of a violation is that the contract shall be void "as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, . . .". It is only the *contract rights* of the party in violation which are voided. The party in violation can not enforce his or its rights thereunder. But no rights of the party not in violation are impaired. And where, as in the instant case, the party charged with being in violation of § 78p(c) has by default in a material matter breached the contract, after having partially performed, and because of this breach is precluded from enforcing the contract against the other party, the presence or absence of a § 78p(c) violation is without material legal effect. The rights of the other party are the same in either event. The purchaser's rights are neither impaired nor regulated by § 78cc(b). That the rights of the purchaser are accompanied by correlative duties to the seller does not impinge upon the declared purpose and effect of the federal statute, where it applies, to void the *contract rights* of the seller.

We have considered *Goldenberg* v. *Bache and Company*, 5 Cir., 270 F. 2d 675 and *Kaiser-Frazer Corp.* v. *Otis & Co.*, 2 Cir., 195 F. 2d 838, relied upon by Bankers. Neither case holds nor infers that § 78cc(b) permits the party not in violation to accept performance or partial performance,

retain the securities delivered, without making payment. In *Goldenberg* the application of § 78cc(b) was not reached because the action was not commenced within the period of limitations. *Kaiser-Frazer* involved an attempt by the party in violation to enforce the contract. These cases do not support Bankers' position that it may retain the shares delivered without making any payment therefor.

Whether the seller's rights under the contract have been voided by § 78cc(b), or have become unenforceable because of its breach of the contract, the rights of the purchaser are to be measured by the law of the jurisdiction involved. Here the contract was made in Illinois. Bankers' election to retain the shares delivered was made in Illinois. The law of Illinois governs.

In *Richards* v. *Shaw*, 67 Ill. 222 the plaintiff had only partially performed his contract to sell and deliver 500 bushels of corn at an agreed price. The defendant urged that the plaintiff could not recover without showing completion of the contract. The court (p. 224) stated:

> "It is a rule, supported by a very respectable weight of modern authority, that, if the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfill his contract. *Oxendale* v. *Wetherell*, 9 Barn. & Cressw. 386; *Shipton* v. *Casson*, 5 ib. 378; *Booth* v. *Tyson*, 15 Vt. 515; 2 Story Con. sec. 847; 2 Parsons Con. 668, and cases cited in note; *Bowker* v. *Hoyt*, 18 Pick. 555.
>
> Although this rule may be a relaxation of the earlier and more generally received doctrine, that the entire performance, on the part of the vendor, of such a contract as the one in question, is a condition

precedent to the payment of the price, and the maintenance of an action for its recovery, the rule seems to be a fair and just one, and we are disposed to give it our acquiescence."

In *Oxendale* v. *Wetherell*, 9 Barn. & Cressw. 386, 109 Eng. Rep. 143, cited by the court, the rule was laid down as follows:

"Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered."

In *United States* v. *Molloy*, 2 Cir., 144 Fed. 321, 324 the court quoted *Oxendale*, as above, with approval and added:

"To the same effect is *Boucker* v. *Hout*, 18 Pick. (Mass.) 555; *Richards* v. *Shaw*, 67 Ill. 222, and cases cited.

In Benjamin on Sales (7th Ed.) Bennett's Notes, p. 80, Mr. Bennett says:

'With us also it has been frequently held, in conformity with *Oxendale* v. *Wetherell*, that if part of an entire order for goods is accepted and retained after or with knowledge that the whole will not be furnished, an implied contract arises to pay pro rata, subject in some courts to a counter claim for damages for noncompletion. *Boucker* v. *Hout*, 18 Pick. (Mass.) 555, an excellent illustration; *Richards* v. *Shaw*, 67 Ill. 222; *Flanders* v. *Putney*, 58 N. H. 358; *Harralson* v. *Stern*, 50 Ala. 347; *Sentell* v. *Mitchell*, 28 Ga. 196; *Goodwin* v. *Merrill*, 13 Wis. 658; *Booth* v. *Tyson*, 15 Vt. 518; *Shaw* v. *Badger*, 12 Serg. & R. (Pa.) 275; *Rulz* v. *Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Saunders*

v. *Short*, 86 Fed. 225, 30 C. C. A. 462 and cases cited.'

Mr. R. N. Benjamin states the rule as follows:

'It is a rule supported by the weight of modern authority, that, if the buyer of a specified quantity of goods sold under an entire contract, receive a part thereof, and retain it after the seller has refused to deliver the residue, there is a severance of the entirety of the contract, and the buyer becomes liable to the seller for the price of such part; but he may reduce the seller's claim by showing that he has sustained damage by the seller's failure to fulfill his contract.' R. N. Benjamin's Principles of Sales, p. 146, § 3, and cases cited."

In Williston on Contracts (2d Ed. 1937), Vol. 5, § 1474 at pp. 4121-2 the following observations are made concerning the rule and the legal theories involved:

". . . But if the deficient quantity of the goods was delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here accordingly, if the seller recovers payment for what he has furnished and the buyer has not returned, it must be on the principles of quasi contract. It is true that it has often been said that a contract will not be implied by law in favor of one who is in default under an express contract, but the injustice of allowing the buyer to retain the benefits of goods without paying for them is so clear that even in England, where quasi contractual rights are generally most strictly limited, recovery has been allowed, and without the aid of a statute the weight of authority in the United States strongly supports this view.

* * * * *

The measure of damages in such an action is not necessarily the contract price even if the contract fixes a price by number, weight, or measure, . . . As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received, . . ."

Whatever difficulties may exist in accommodating abstract and formal concepts of contract law to the formulation of the rule evolved and recognized by the cases and authority above cited, and applied in Illinois, should be resolved by the "overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it' ". *Kelly* v. *Kosuga*, 358 U. S. 516, 520-521.

Bankers' election to retain the 500,000 shares of stock delivered obligated it to pay for the same. Its self-serving characterization of the 500,000 shares as an "earnest deposit" is wholly without foundation either under the terms of the contract or the evidence in the record. Nor was there a provision for forfeiture or liquidated damages in event of default.

Under Count V of its counterclaim Bellanca seeks to recover $4,000,000.00 as the "contract price" of the shares delivered. Under Count VI it seeks to recover $4,000,000.00 as the "reasonable value" of the shares at the time of delivery.[5]

The District Court found the reasonable value of the stock on the date of Bankers' election to retain it, August 8, 1956, to be $2.50 per share—the lowest market value on that date. The principal sum of the judgment is computed on that basis. In our opinion the District Court did not err in measuring the recovery by such market value on the date of Bankers' election.

The $8.00 per share figure recited in the contract, and claimed by Bellanca to govern, cannot be wrested from its context. At the most, it was the price Bankers was willing to pay for 1,112,500 shares *if* it obtained such additional shares at $6.75 per share as would give it 51% stock ownership of Automatic and, *if* it could make payment

5. The market value on the date of delivery, May 10, 1956 was $6.75 per share.

for the 1,112,500 shares by transfer of stocks it owned in four other corporations at the agreed valuation. Under these contractual provisions consideration of $8.00 per share as the "contract price" would be wholly unjustified and unrealistic.[6] In addition, insofar as the market price on the date of delivery ($6.75 per share) is concerned Bellanca's default and breach, which made it impossible for Bankers to complete the contract, did not occur until August 8, 1956, when it failed to make delivery of the balance of the shares as required under the contract. Under the facts here involved we are of the opinion that the measure of Bankers' liability should be restricted to the value it received—the value of the stock at the time it exercised its election to retain it. See Williston on Contracts, § 1474, *supra*. It could have returned the 500,000 shares and recovered any damages it sustained by reason of Bellanca's breach. But it elected to retain the shares and it makes no claim for damages.

Whether or not a party is entitled to interest under Ill. Rev. Stat. Ch. 24, § 2 because of "unreasonable and vexatious delay" depends upon the circumstances of each particular case. *People ex rel. Carpentier* v. *Central and Southern Truck Lines, Inc.*, 17 Ill. 2d 120, 124, 160 N. E. 777. Here the value of the shares retained was readily ascertainable by reference to a generally recognized standard—the market price on August 8, 1956—and the amount payable a simple matter of computation. Cf. *Harvey* v. *Hamilton*, 155 Ill. 377, 380, 40 N. E. 592, 593; *Kelley, Maus & Co.* v. *Caffrey*, 79 Ill. App. 278, 279.

On the record before it the District Court was justified in concluding that Bankers' refusal to pay for the shares it elected to retain was both unreasonable and vexatious.

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6. Consequently there is no "contract price" which would permit application of Ill. Rev. Stat. Ch. 121½, 44(1), relied upon by Bellanca.

The District Court did not err in the allowance of interest on the principal amount of the judgment.

In each of the appeals (No. 13190 and No. 13191) the judgment order of the District Court is affirmed.

AFFIRMED.

APPENDIX E.

TEXTS OF RELEVANT STATUTES.

(1) Section 16(a) and (c) of the Securities and Exchange Act of 1934,

§ 78p, subparagraphs (a) and (c) of Title 15 U. S. C. A. as follows:

> "Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month."

> "It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other

usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense."

(2) Section 29 of the Securities and Exchange Act of 1934, § 78cc subparagraphs

(a) and (b) of Title 15, U. S. C. A. as follows:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or

for whom any broker or dealer purchases, a security
in violation of any rule or regulation prescribed pur-
suant to paragraph (1) of subsection (c) of section 780
of this title, unless such action is brought within one
year after the discovery that such sale or purchase
involves such violation and within three years after
such violation.